pany had nowhere raised the issue of lawful termination in accordance with the contract. But the High Court was completely taken up with this one argument and it held a person whose contract was simply terminated was not dismissed in the sense that word was used in section 20 of the Industrial Relations Act, 1967 (the Act), under which the workman had made his representations; there was therefore no evidence that the workman had been dismissed and that in coming to this finding of fact, the Industrial Court had committed a jurisdictional error.

After we had allowed the appeal from the decision of the High Court but before we had time to give our reasons, another division of this court delivered a considered judgment which dealt, *inter alia*, with this very same point. In *Dr. A. Dutt* v. *Assunta Hospital*,[15] this court held that the so-called "termination simpliciter" i.e. a termination by contractual notice and for no reason, if ungrounded on any just cause or excuse would still be a dismissal without just cause or excuse and on the workman's representations, the Industrial Court may award reinstatement or compensation in lieu of reinstatement.

Under the Industrial Relations Act, 1967 what the employee can do in the case of a unilateral termination is to apply under section 20(1) of the Act. This section which reads:

"20. (1) Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within thirty days of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed."

is, in our view deliberately, couched in subjective terms. Where a non-union workman considers that his dismissal is without just cause or excuse, he may make representations for his reinstatement. It is not whether he had been dismissed without just cause or excuse; but it is how he considers he has been treated by his employer that constitutes the test for his action.

We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

In the instant case, the High Court entirely agreed with the Industrial Court that there was no redundancy. Indeed, it could not do otherwise on the evidence. But even assuming for the moment that the High Court would be correct in disagreeing with the Industrial Court on what is essentially a finding of fact and disregarding the ouster provisions in the Act, we would adopt the words of May J. in *London Transport Executive* v. *Clarke*[16]:

"... though we may disagree with it as a matter of fact, (we do not think) it can be upset on appeal by this appeal tribunal. We think it of prime importance in these cases that, unless it can be demonstrated that the industrial tribunal has gone wrong in law, this appeal tribunal should uphold the decisions of industrial tribunals who after all are there, as the Court of Appeal has said, to decide these very things; and the whole purpose, efficacy and informality of industrial tribunals, just as with so many other domestic tribunals that exist in modern society, would be undermined completely, if after a minute examination, as it was described in one case, the appeal tribunal was prepared to disturb decisions of industrial tribunals which otherwise did not err in law."

But on the finding that there was no redundancy as suggested by the company the conclusion is inevitable that the termination was without the cause or excuse advanced and therefore without just cause or excuse.

We do not think that having regard to the company's pleadings in the Industrial Court, the High Court was correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court, but assuming that it is possible for it to do so since this question was raised in the statement in support of the application for *certiorari*, we are of the opinion for the reasons given by this court in *Dr. Dutt's* case, that termination by due notice but without just cause or excuse is a dismissal in respect of which the Industrial Court can make an order for reinstatement or an award of compensation in lieu of reinstatement.

For these reasons, the appeal was allowed with costs here and in the High Court.

Appeal allowed.

Solicitors: *D.P. Xavier & Co.; Shearn, Delamore & Co.*

G TEONG WEE MEOW v. GOH POH CHAN & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) June 25, 1980 & April 7, 1981]
[Kuala Lumpur — Federal Court Civil Appeal No. 53 of 1979]

Tort — Negligence — Failure to provide safe place of work or safe system of work — Digging well near pig-sty — Deceased persons overcome by gaseous fumes and vapours from well — Liability of employer.

Labour Law — Deceased persons employed to dig well near pig-sty — Overcome by gaseous fumes and vapours from well — Failure to provide safe place of work or safe system of work.

In this case the appellant employed the deceased persons and other persons to dig a well for the pigs on the appellant's land near his pig-sty. While working in the well the deceased persons were overcome by gaseous fumes and vapours from the well resulting in their deaths. It was alleged that the appellant was negligent in failing to provide a safe place of work or safe system of work. Earlier a worker working in the well had fainted and the appellant knew this. It was therefore claimed that the appellant knew that the place was unsafe and he failed to warn the deceased persons of the dangerous condition of the well which he knew or ought to have known. The learned trial judge found for the respondents and the appellant appealed.

Held: in this case there was overwhelming evidence to show that the appellant knew the presence of gaseous fumes from the well and the learned trial judge was right in holding that the appellant was wholly liable for the deaths of the persons.

Case referred to:-

(1) *Bamfield* v. *Goole and Sheffield Transport Company Ltd.* [1910] 2 K.B. 94.

FEDERAL COURT CIVIL APPEAL.

M.C. Choong for the appellant.

K. Pasupathy for the respondents.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): In this appeal the only question to be determined is whether the appellant is liable for the deaths of the six persons while working in a well on the land of the appellant. The 4 civil suits brought by the respondents have been consolidated. In the statements of claim (which more or less are the same), it was alleged that on May 30, 1971 the appellant employed the deceased persons and other persons to dig a well for the pigs on the appellant's land near his pig-stys, and while working in the well the deceased persons were overcome by gaseous fumes and vapours from the well resulting in their deaths. The claim was based on the negligence of the appellant in not providing a safe place of work or safe system of work. The particulars given are that the appellant knew the place was unsafe and he failed to warn the deceased persons of the dangerous condition of the well which he knew or ought to have known.

In his defence the appellant denied negligence and stated that the work of digging the well was given to Lim Ah Tee, deceased person in the 3rd estate, who it was contended by the exercise of reasonable care should have known of the existence of the fumes or gaseous vapours in the well. It was further pleaded that the presence of fumes or gaseous vapours in the well constituted an act of God and the appellant could not, therefore, have been responsible for the deaths.

At the conclusion of the trial the High Court at Seremban found for the respondents.

On the evidence before the trial court there can be no dispute that the six persons worked on the land of the appellant.

The appeal is mainly on the following findings of facts by the trial court:

"I accepted the evidence adduced on behalf of the plaintiffs that the defendant knew that Gopal who was in the first group of workers had fainted in the well. As such the defendant was negligent in not taking appropriate steps to enquire into the cause of this incident when Gopal fainted in the well and thereafter to take necessary steps to remedy the defect in the well. As for the relationship between the workers and the defendant all the deceased persons and the survivors were employed by the defendant. Even if it was a contract work which was given out to one person the six who died in the well were in the position of invitees to whom the defendant owed a duty to see that there was no dangerous or harmful substance in the well to affect the health of the workers."

It is contended that there was no evidence to show that the deceased persons died as a result of gaseous fumes or vapours in the well, and since no medical reports were produced as to the cause of death it must have been presumed that the deceased persons did not die as a result of gaseous fumes or vapours from the well.

The respondents in establishing their case relied on the evidence of Gopal (PW2) and Ramasamy (PW3) who had worked at the well. Gopal in evidence said that he was in the first group of workers digging the well; after 2 days they had dugged 15 feet and while he was trying to install a pipe in the well he was overcome by a dirty smell; and was unable to breathe and fainted. Ramasamy also said that the well exuded a bad smell when Gopal fainted in the well. He further said that the water in the well was very smelly; so they left without completing the work. He also said that after he had taken out Gopal he informed the appellant who took Gopal to the hospital in his car, and that Gopal remained in the hospital for a day. The evidence of Gopal and Ramasamy clearly showed that the appellant knew that the well was not safe to work in.

The evidence also showed the 2nd group of workers consisted of 8 persons (who took over from Gopal and Ramasamy), out of whom 6 persons while going down the well to fix a pipe fell into the well and died. According to Gan Keng Tee, (PW4), the six persons died when they fell into the well going half way down the ladder in the well. He also said that he did not notice anything coming out from the well.

A defence witness, a mining consultant, (DW1), said that in his experience he had not come upon anyone dying because of fumes in a well. He also said that in the present case there were few pig-stys near the well, the nearest was about 50 ft. and the proximity would have caused gas to be formed in the well and there could be other causes. No evidence was given that the mining consultant took any gaseous sample from the well. In any case, in cross-examination he said that faeces of animals in concentration would produce hydrocarbon gas which could kill depending on the volume of concentration.

From the evidence of Gopal and Ramasamy we agree with the learned judge that the appellant was negligent in not taking appropriate steps to enquire what had caused Gopal to faint in the well. There was clear evidence that the well gave out dirty smell. Gan Keng Tee (PW4) merely said that he did not notice anything coming out from the well. Apparently he was not asked whether there was any smell, in view of the overwhelming evidence of Gopal and Ramasamy. The defendant must have known about this smell. The smell might have come from inside the well or even drifted into the well from the surrounding pig-stys. It is common knowledge that pig-stys give out strong smell even in open air. When concentrated in a well 5 ft. in diameter and 15 ft. deep, the smell must be overpowering. Whatever it was that caused the smell, the fact remains that Gopal had fainted in the well. There was clear evidence it was the appellant who took Gopal to the hosiptal. The appellant must have known about the smell in the well as Gopal and Ramasamy left without completing their work. It was his duty to determine what had caused Gopal to faint. When he employed the 2nd group of workers, it was also his duty, in the circumstances of the case,

to inform them what had happened to Gopal so that they could take precautions. But he chose not to inform them, not even to Lim Ah Tee, deceased person in the 3rd estate, to whom the work of digging the well was given.

In *Bamfield* v. *Goole and Sheffield Transport Company, Limited*[1] (citing from *Charlesworth* on Negligence, 4th ed. para 712)

"when the defendants shipped ferro-silicon on board a keel belonging to the plaintiff's husband, and the ferro-silicon gave off poisonous fumes which killed her husband and injured the plaintiff herself, it was held that the defendants were liable to the plaintiff although they were ignorant of the danger arising from ferro-silicon."

In the present case, there was overwhelming evidence to show that the appellant knew the presence of gaseous fumes from the well.

We therefore agree with the learned trial judge that on the evidence adduced the appellant was wholly liable for the deaths of the six persons.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Kam Woon Wah & Co.; Murphy & Dunbar.*

KHO NEE HIN v. SELIMAH BTE. ABDUL GHANI & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) June 24, 25, 1980 & April 7, 1981]
[Kuala Lumpur — Federal Court Civil Appeal No. 99 of 1979]

Torts — Negligence — Dependency Claim — Interest on award.

In this case the claim against the appellant and two others by the respondents was based on negligence arising from a road accident. As a result of the accident, the deceased who was travelling as a passenger in a land rover was killed. The learned trial judge awarded $23,000.00 as pre-trial loss of dependency and $57.204.00 as after-trial loss of dependency. He agreed that the loss of dependency was $450.00 a month but cut down the purchase period for future loss from 20 years (as claimed) to 14½ years. He also awarded 4% interest on the pre-trial loss of dependency. The appellant appealed against the quantum and also against the award of interest at 4% instead of the usual 3%.

Held: in the circumstances of this case, the generosity shown by the learned trial judge was in favour of the appellant and the appeal should be dismissed.

Case referred to:-

(1) *Cookson* v. *Knowles* [1978] 2 All E.R. 604.

FEDERAL COURT CIVIL APPEAL.

G. Sri Ram (*Joseph Chia* with him) for the appellant.

David Tay for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): This appeal is against the decision of the High Court at Seremban in awarding 4% interest instead of 3% on pre-trial loss of dependency, in awarding $23,000 as pre-trial loss of dependency, and $57,204 as after-trial loss of dependency, and generally in failing to apply the proper tests and proper method in calculating total loss of dependency.

The claim against the appellant (who was first defendant at the trial) and two others by the respondents, the widow and 3 infant children of the deceased person, is based on negligence arising from a road accident. The deceased person had been travelling as a passenger in a land rover driven by the second defendant, agent and servant of the Government of Malaysia, the third defendant, when the land rover collided with a motor car driven by the appellant along the same road proceeding in the same direction, Tampin to Gemas. It also states that the accident was caused by the negligence of the first defendant and by the second defendant or by either of them. It is unnecessary to go through the particulars of negligence as the appeal is merely against the matters set out above.

At the trial it was agreed that either the appellant or the second defendant was or both were liable. Dependency was also agreed upon. In view of the agreement as to liability, the appellant's side adduced no evidence at the trial. On the question of quantum for pre-trial loss (from the date of death to date of trial) the appellant's side agreed that the period should be 66 months, but the rate of interest should be 3% relying on the decision of the House of Lords in *Cookson* v. *Knowles.*[1]

As regards loss after the date of trial, it was submitted that deceased was 29 years old when he died, and considering that he could have been working for another 26 years, 20 years purchase would be reasonable, and after deducting 66 months, i.e. pre-trial period, 14 years purchase would be reasonable. This loss would, therefore, be 14 years × $200 = $23,756, the total therefore would be $38,365.

The respondents' side submitted that from the figures shown on the annual earnings of the deceased between 1973 and 1979, the average monthly income was $448.71; for pre-trial loss, a fair figure for dependency should be $350 per month for 66 months — total $23,100 plus ½ bank rate, 4%; as to future loss of dependency the average income for this should be $450 per month, with 20 years purchase $67,284.

The learned trial judge agreed with the submission of the respondents' side as to the earnings of the deceased but cut down the purchase period for future loss to 14½ years. (The appellant's side asked that this period should be 14 years). No interest was given for future loss.

The trial of the case was in March, 1979. The evidence shows that when deceased died in September, 1973 he was earning $230 per month. According to a letter of 9th March, 1979 from Ibu Pejabat, Rancangan Pembasmi Malaria, Seremban (page 63 of appeal record), the salary of the deceased in March, 1979 would be $445 under the new Cabinet Committee Report; this rise in salary was from January 1, 1976 and normal increments included. (The letter also mentions additional allowances, "Elaun Bantuan Khas" $30 per month from October 1, 1973 to June 30, 1977 and one month's salary as bonus annually from January 1, 1974 to June 30, 1977). According to the calculation